OPERATING ENGINEERS LOCAL UNION NO. 3

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Jurisdiction: Northern California, Northern Nevada, Utah, Hawaii, and the Mid-Pacific Islands

Via Facsimile (408-292-6755) and US Mail

January 9, 2008

San Jose Sunshine Reform Task Force
C/O Eva Terrazas, Redevelopment Agency
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

RE: City of San Jose (Public Disclosure of Employee Disciplinary Records and other Confidential Employee Personnel Records)

Dear City of San Jose Sunshine Reform Task Force Public Records Subcommittee:

I write to you on behalf of Operating Engineers Local Union No. 3 (OE3) which represents City of San Jose employees. OE3 Business Representative Bill Pope requested that I review your proposals and current laws and provide your Task Force with the Union's stance concerning your proposed rulemaking.

California Government Code § 6354(c), §6255 and the California Constitution Art 1 all demonstrate the inherent privacy concern impacting the rule under discussion. The Legislature clearly understood the importance of preserving pubic employees' privacy interests because the California Public Records Act (CPRA) begins with the phrase: "In enacting this chapter, the Legislature is mindful of the right of individuals to privacy." The Task Force's proposed rulemaking would violate an employee's reasonable expectation of privacy. The Act specified in Government Code § 6354(c) clearly exempts "personnel, medical or similar files" which if published "constitute an unwarranted invasion of personal privacy." Employee performance evaluations and disciplinary records are contained within an employee's personnel record. Thus the code clearly includes them in the exempt category.

Public employees have a legally protected interest in their personnel files. *Teamsters Local 856 v. Priceless*, LLC, 112 Cal.App.4th 1500, 1512-1514 (2003). The City to date has treated an employee's disciplinary records as confidential personnel records. This historical treatment establishes the employee's substantial privacy interest and the employee's reasonable expectation in privacy of their personnel records. If the City opts to publish all disciplinary

records in an attempt to showcase open government, then it violates the employee's reasonable expectation of privacy in violation of the state constitution.

Such an action by the City would result in lengthy litigation where employees would have at least two options: (1) to enjoin the City from publishing the confidential personnel records and (2) bring a cause of action for invasion of the employee's right of privacy. The California Constitution does not exempt public employees such as City of San Jose employees from its protections and the City is foolish to think otherwise.

The only method for the City to prevail in such litigation is to show that the need to disclose the protected information outweighs the individual's privacy rights. The City has failed to identify such an overwhelming need. A general need for open governance simply is not enough. Public employees like all other California citizens have an inherent right to privacy in their personnel files. Blanket disclosure of disciplinary records is not permissible *ever*. On a case-by-case assessment whether to disclose an individual employee's disciplinary record, the City's need must present a compelling basis for disclosure that a court of law would find to outweigh the established privacy right the employee has to keeping their disciplinary record confidential.

Also note that *BRV, Inc,*[1] cited by attorney James Chadwick on behalf of the San Jose Mercury News, is distinguishable from the instant case. *BRV, Inc.* clearly involved high-ranking officials, school district superintendent and school principal, whereas the instant case involves rank and file members. Please note that the represented city employees we represent do not constitute high-ranking employees. None of the represented employees serve in an elected capacity and thus have not relinquished any privacy claims. They do not have positions that grant them governance authority. Thus such action to disclose represented employee's disciplinary records would not achieve the City's goals.

Please note that while Mr. Chadwick argues that a complaint's discipline assessed and evidence constituting the complaint's basis is sufficient for disclosure of confidential personnel information, the City opens itself up to litigation by following that assessment. A Notice of Adverse Action prior to a requisite Skelly hearing and subsequent appeal does not in the Union's eyes constitute a sufficient basis for disclosure. Parties to a disciplinary matter frequently minimize the initial level of punishment assessed, if they assess any punishment at all. To publish the Notice of Adverse Action could constitute defamation and an invasion of the public employee's privacy right, since at that point they are more akin to mere allegations of wrongdoing. Once the City discloses a public employee's disciplinary record, then the employee's reputation in the community is tainted and subsequent correction could never repair the harm caused by the initial disclosure. The employee has thus been deprived of a substantial privacy interest.

The classifications of types of disciplinary records for publication are too broad and the City should limit disclosure to high-ranking employees and elected officials. Virtually all disciplinary matters involve some level of dishonesty. For example, not informing a supervisor as to why a particular employee did not report to work could constitute dishonesty even if the employee were absent for a legally protected activity such as an American Disability Act (ADA) or Family

[1] *BRV, Inc. v. Superior Court of Siskiyou County*, 143 Cal.App.4th 742 (2006)

Medical Leave Act (FMLA) covered medical emergency. That example illustrates a case where the cause of the disciplinary action is of a personal and family nature. Many disciplinary matters are tied to personal and family matters whether the case of medical, the employee's involvement in a divorce or other family matter, or other subject matter with high privacy considerations that the legislature considered when drafting California Government Code § 6354(c).

As an aside, OE3 recommends that the subcommittee revise the exemption language in 5.1.2.040 for professional biography to remove publication of employee names, gender, ethnicity, date of birth and all personal contact information such as cellular phone numbers and e-mail addresses in addition to those specified. To publish such information infringes on the employee's right to privacy. OE3 argues that following the San Francisco model of publishing resume information infringes on the employee's right to privacy by making it easy for others to figure out specific confidential personnel information about a particular employee by linking all the disclosed information under the proposed guidelines together and open public service employees up to harassment, not to mention possible identity theft. The items recommended for nondisclosure are intimate details of the employee's personal and family life. Thus they are clearly exempt.

Thank you for your time and consideration.

Sincerely,

Jolsna John

Jolsna M. John, Esq.
Associate House Counsel

CC: Bill Pope, Business Representative
Don Dietrich, Public Employees Director

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